THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 74 OF 2022

(Originating from Criminal Case No. 68 of 2021 in the District Court of Lindi, at Lindi.)

HAMISI SAID KIBUNDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 20.03.2023
Date of Judgment: 23.06.2023

Ebrahim, J.

This appeal stems from the decision of the District Court of Lindi in Criminal Case No. 68 of 2021 at Lindi where the appellant, Hamisi Said Kibunda was charged with the offence of armed robbery c/s **Section 287A of the Penal Code, Cap 16 of R.E. 2019 [Now R.E 2022]**

(the Penal Code). It was alleged that on 2nd November, 2021 at Kilolombwani village within the District and Region of Lindi, the appellant did break the shop and steal therein Tanzania shillings Three Million (TZS 3,000,000/=), the property of one Said Selemani. Immediately before and after stealing he used a knife to cut on the left shoulder of one Ramadhani Seleman in order to obtain the foresaid property.

In this case, the appellant was found guilty, convicted and accordingly sentenced to a mandatory sentence of 30 years imprisonment. He was aggrieved, hence this appeal.

The brief facts established from the evidence on record are that Ramadhani Selemani (PW1) a shopkeeper at his brothers' shop. at night of 02.11.2021 he was sleeping in the room which is next to the shop. He heard the breaking in. He woke up and went to the shop. He saw the appellant into the shop with another person whom he was not able to identify. The appellant rushed to the drawer which had money and took TZS. 3,000,000/=. At that time the other person was obstructing him from going where the appellant was. PW1

testified also that the distance from where he was and the draiver was like 5-foot step.

He managed to identify the appellant because inside the shop the electricity light with very big bulb with bright light was on which enabled one to see even outside the shop.

PW1 told the trial court that before the incident date he happened to see the appellant more than 10 times at the village. He further stated that on the incident date the appellant had worn red t-shirt and a white pair of jeans.

After the incident, the Appellant went out from the shop, PW1 pushed the person who was obstructing him and managed to run outside the shop. The other man went outside following the appellant attempting to leave with the motorcycle which they came with. PW1 tried to hold on the motorcycle because it failed start and it was then that the appellant took a knife from his bag and cut PW1 on his left shoulder. PW1 raised an alarm and people woke up. However, the accused person and his fellow run away leaving behind the motorcycle which was 6 foot steps from the shop. The motorcycle make was HAOJUE red in colour but PW1 could not

manage to catch the registration numbers because he was bleeding profisely. PW1 was helped by people who took him to VEO and he reported at Mchinga police station where he was issued with PF3. He went to Kilolambwani Health Centre for treatment.

PW4, Joseph Fulgence Njozi, (WEO) after been informed of the incident which took place on 02.11.2021 at night, went to the crime scene but did not find PW1. He found people surrounding the motorcycle with Reg. No. MC 402 DUL and a bag which was at PW1's shop. Together with VEO, they took the said things and went to keep them at his office. Thereafter they went to Kilolambwani dispensary to see PW1. On the following day they took the motorcycle and the bag to the police station because the police station was far about 25 km.

PW5, Fariji Rashidi, motorcycle mechanic at Kikomolela testified to have known the Appellant and seeing him at Komolela village. He testified also that the Appellant was his customer who had gone to his garage three times to repair and change oil of his motorcycle make HAOJUE red in colour with registration MC 402 DUL. He was thus able to identify it.

PW7, Raphel Aniseti Mpemba, doctor from Namkongo dispensary testified that on 02.11.2021 while he was at his house in Kilolambwani, he was called to go and attend PW1 who had a wound on his shoulder. He examined the wound and prescribed to PW1 pain killers and anti-infection medicine. He further told the trial court that the wound was caused by a cut from a sharp object. He explained that PW1 suffered serious pain which caused him not to use the left hand.

In his defence the Appellant (**DW1**) denied to have committed the offence he is charged with **DW2** (grandfather of DW1) testified before the trial court that in the morning of 02.11.2021 the appellant went to Mchinga. Around 17:00 hours he started getting worried about him. He went to Mchinga to look for him and he was told that he was taken to Mchinga police station, he went there but he was told that he was taken to Lindi police station but he did not ask the reason for him being taken to Lindi Police Station rather he preferred to go back home. On the following day he went to Lindi police station and he was told that the appellant is there but he was not given any reason why he was there.

Having considered the evidence of both sides the trial court found the Appellant guilty, convicted and sentenced him as hinted above.

Aggrieved by the conviction and sentence, the Appellant preferred this appeal. His petition of appeal contained a total of twelve grounds of appeal. Later on he filed two additional grounds of appeal which however all can be conveniently grouped into seven as follows:-

1. The Honorable trial Magistrate erred in law and in fact in convicting and sentencing the appellant with the offence while the charge was not proved beyond reasonable doubt.
2. The Honorable trial Magistrate erred in law and fact by convicting and sentencing the appellant relying on the evidence adduced by PW1.
3. The Honorable trial Magistrate erred in law and in fact in convicting the Appellant without considering that Appellant was not arrested with any exhibit and exhibit P3 was not found in possession of the appellant.
4. The Honorable trial Magistrate erred in law and fact when by convicting and sentencing the appellant without considering

the search and interrogation of the appellant was illegally conducted.

5. The Honorable trial Magistrate erred in law and fact when by convicting and sentencing the Appellant without proper identification of the Appellant.
6. The trial court erred in law and in fact when by convicted and sentenced the appellant basing on the evidence adduced by PW1-PW8 and admitted exhibit P1-P9, while at the preliminary hearing, prosecution side informed the court to have six witnesses and three exhibits.
7. The trial court erred in law and in fact when it convicted and sentenced the appellant basing on the evidence adduced by PW2 who was not a credible witness.

When the appeal was called for hearing, the Appellant appeared in person, unrepresented whereas Ms. Mangu, learned Senior State Attorney appeared for the Respondent/Republic.

The Appellant had nothing to add. He only prayed for the court to consider his grounds of appeal and to be set free so that he can go and take care of his family.

In response, Ms. Mangu learned Senior State Attorney supported the conviction and sentence. She contended that the Appellant was convicted following the strong evidence of identification. She said, PW1 explained that he knew the appellant before the incident and he recognized him from the short distance and the intense light. She said further that PW1 was able to describe the clothes which the Appellant had worn on the incident day. Due to that fact she argued that there was no doubt about the identification of the Appellant. She cited the case of **Waziri Amani v. The Republic [1980] TLR 250** on identification. Ms. Mangu added that PW1 mentioned the Appellant at the first instance which enabled the Appellant to be arrested easily.

She further submitted that it is the position of the law that mentioning the accused at the earliest stage confirm his credibility. She referred the case of **Marwa Wangiti Mwita v. Republic, [2002] TLR 39** to cement her argument.

She averred moreover that, there was corroborative evidence of PW5 together with exhibit P3. She explained that PW1 said the Appellant left the motorcycle (exhibit P3) at the crime scene and

PW5 confirmed that the motorcycle belongs to the Appellant because he took it to his garagefor maintance more than three times.

Submitting further, Ms. Mangu said that the Appellant stabbed PW1 with a knife after taking the money and PW7 tendered PF3 (exhibit P7). She joined the corroborative evidence adduce to show that prosecution side managed to prove its case beyond reasonable doubt as observed by the trial court.

In his rejoinder, the Appellant reiterated that he did not commit the offence.

The issue is **whether the prosecution proved the case beyond reasonable doubt.**

In the analysis of evidence, the court shall rely on the evidence adduced by PW1, PW2, PW3, PW4, PW5 and PW 7 who were in the list of prosecution witnesses and Exhibit P3 and Exhibit P7 which were in the list of exhibits at the trial court.

Starting with ground of appeal no. 5 as to **Whether the evidence of identification is water light.** it is now trite law that in a determination

depending on such evidence, conditions favouring correct identification is of utmost importance. In the case of **Nchagwa Matokole @ Lante vs Republic (Criminal Appeal 315 of 2013) [2014] TZCA 212 (21 October 2014, TANZLII)**, the Court revisited the case of **Waziri Amani v. Republic [1980] TLR 250** where pertinent features of visual identification were underscored and went on to lay down other factors to be taken into account by trial courts in satisfying themselves if such evidence is watertight. The laid factors are:

a. *"The time the witness had the accused under observation.*
b. *The distance at which he observed him.*
c. *The conditions in which such observation occurred.*
d. *If it was day or night time.*
e. *Whether there was good or poor lighting at the scene.*
f. *Whether the witness knew or had seen the accused before or not."*

The same guidelines apply in cases of recognition. From the record, PW1 was very clear in his testimony that it was the Appellant who stole the money, cut him with a knife which caused him injury. Furthermore, PW1 knew the Appellant before the incident. He described the distance between the appellant who was standing at the drawer and himself (PW1) to be five footsteps. PW1 gave a vivid

account on how the appellant attacked him and said he was able to see the Appellant when he entered the shop that night because there was intense electricity light from big bulbs inside and outside the shop. At the end of it all the Appellant managed to stab PW1 and run away leaving behind the motorcycle.

The testimony of PW1 was corroborated by PW4, PW5 and PW7 who testified that Exhibit P3 (motorcycle) was left at the crime scene. PW5 testified to have seen the Appellant with the motorcycle at the village and he is the mechanic who repairs that motorcycle. PW7 testified to have filled the PF3 which was brought by PW1 from the police station from to the occurred incident.

Considering the above factors and particularly the physical close proximity during the incident at the crime scene between PW1 and the appellant coupled with the fact that PW1 knew the Appellant; I am of the firm stance that PW1 was in a position to identify the Appellant without any doubt. Having found the visual identification of the Appellant at the scene to be impeccable, it eliminated all possibilities of mistaken identity.

As for the 1st and 2nd grounds of appeal, PW1 said on the incident night he heard the break in at the shop and he woke up. He was sleeping in the next room from the shop. There was an intense light inside and outside the shop and in his room. He saw the Appellant and his fellow entering the shop. He saw the Appellant taking the money and he could not stop him because he was blocked. After the Appellant had stolen the money they run away with his fellow but PW1 went after them and he wanted to retrieve the money which was stolen by the Appellant and his fellow. In the cause of blocking the motorcycle to move away from the crime scene, the Appellant stabbed him with a knife on his shoulder and it was when PW1 raised an alarm. People gathered and the Appellant run away leaving behind the motorcycle which he could not catch up the registration number because it was surrounded by people and he was bleeding.

PW4 confirmed to have gone at the crime scene at 2:00 am and he found the motorcycle (exhibit P3). He took it to his office because the police station was about 25 Km away. He surrendered following day exhibit P3 the at Mchinga police station.

Furthermore, PW5 proved to know the Appellant because he is his customer and he has attended him three times at his garage and the motorcycle which was found at the crime scene is the property of the Appellant.

PW7 who was the doctor did prove to have attended PW1 who was injured during the incident and he was the one who filed the PF3.

Thus, there was ample evidence implicating the appellant.

On ground, of appeal no. 3 and 4, even if the Appellant was not found with any exhibit or the stolen property it does not exonerate him as the evidence against him is overwhelming.

On the issue of search, the Appellant claimed the search was not legally conducted, hence illegal. Looking at the circumstance, when the appellant was arrested by PW3, PW3 testified that after he had filed the case at Mchinga police station, they went together with PW4 to find the owner of the motorcycle. They were informed that the Appellant is the owner. On the same day after getting the information that the Appellant is at Mchinga stand inside the car, he went and arrested him. (Page 13 of the impugned judgement).

Therefore, there was no any search conducted as he left the motorcycle at the crime scene.

As for the 7th ground of appeal, the evidence adduced by PW2 who was the owner of the shop was credible due to the fact that his evidence corroborated with the evidence adduced by PW1, and PW4. In the case of **Nyakuboga Boniface vs Republic (Criminal Appeal 434 of 2016) [2019] TZCA 461 (29 November 2019, TANZLII)**, where the case of **Shabani Daud Vs Republic, Criminal Appeal No. 28 of 2001** was cited authority, it was held that: -

> *" The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses..."*

Basing on the above observations. I find that the evidence adduced by PW1, PW3, PW4, PW5 and PW7 has prove the case beyond reasonable doubt. I find no difficult to disbelieve the Appellant's stony that he does not know the motor cycle and that he was sleeping at home on 02.11.2021 because VEO and WEO found the motor cycle at the crime scene which was the same one

identified by a mechanic to be used by the Appellant. Furthermore, the evidence of SU2 does not provide a tight Alibi because he said all he knew was that the Appellant was sleeping in his 100m. He did not confirm to have seen the Appellant sleeping in his room. Coupled with a water tight evidence of identification, find this appeal to be devoid of merits and I accordingly dismiss it in its entirety.

Order accordingly.

R.A Ebrahim

JUDGE

Mtwara

23.06.2023